Supreme Court, U.S.
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No. 94-1035

In The

Supreme Court of the United States

October Term, 1994

PATERSON MUNICIPAL UTILITIES AUTHORITY,

Petitioner,

v.

HACKENSACK WATER COMPANY, and NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION,

Respondents.

On Petition For A Writ Of Certiorari To The New Jersey Supreme Court

BRIEF AND APPENDIX IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether a substantial federal question involving an alleged taking of water rights has been presented at all in view of the final and conclusive holdings of the New Jersey courts that, as a matter of state substantive law, the petitioner (1) does not possess property rights in the running waters of the Passaic River at the Great Falls of Paterson "to be held without diminution or alteration", and (2) "does not have greater rights than any other riparian owner to the waters of the Passaic River"?

2. Whether the respondents' mere withdrawal of water from the Passaic River upstream of the petitioner pursuant to water allocation permits validly issued by the State of New Jersey constitutes an act of taking entitling the petitioner to monetary compensation?

3. Whether the petitioner's failure to directly challenge the constitutionality of the New Jersey Water Supply Management Act until it filed its petition for certification before the New Jersey Supreme Court, which was summarily denied without opinion, renders this claim inappropriate for certiorari review?

LIST OF PARTIES

The parties to all of the proceedings below were the petitioner, the Paterson Municipal Utilities Authority, and the respondents, the Hackensack Water Company and the North Jersey District Water Supply Commission. The New Jersey Department of Environmental Protection and Energy,[1] while never a party to the action, appeared as *amicus curiae* in opposition to the petitioner's claims before both the New Jersey Supreme Court and the Appellate Division of the New Jersey Superior Court.

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[1] Subsequent to its participation as *amicus*, the agency changed its name to the New Jersey Department of Environmental Protection. It will be hereafter referred to by its present name.

RULE 29.1 STATEMENT

The parent corporation of respondent Hackensack Water Company, a New Jersey corporation, is United Water Resources, Inc. Hackensack Water Company's only subsidiary corporation, Spring Valley Water Company, is wholly owned. Respondent North Jersey District Water Supply Commission, a public authority established pursuant to New Jersey statute, has no parent or subsidiary corporations.

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HACKENSACK WATER COMPANY, and NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION,

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On Petition For A Writ Of Certiorari To The New Jersey Supreme Court

BRIEF IN OPPOSITION

Respondents Hackensack Water Company ("HWC") and the North Jersey District Water Supply Commission ("NJDWSC") respectfully submit that the petition by the Paterson Municipal Utilities Authority ("PMUA") for a writ of certiorari to the New Jersey Supreme Court should be denied.

COUNTER-STATEMENT OF OPINIONS BELOW

In an unreported written opinion dated July 23, 1992, the Law Division of the Superior Court of New Jersey, Passaic County, granted the motion for summary judgment brought by the defendants-respondents HWC and NJDWSC against the plaintiff-petitioner PMUA. Pet. App. 7a-11a. An Order implementing this holding and dismissing with prejudice the PMUA's July 26, 1990 Amended Complaint was entered by the trial court on August 31, 1992. Pet. App. 5a-6a. The Appellate Division of the Superior Court of New Jersey affirmed the grant of summary judgment in an unpublished *per curiam* opinion decided May 2, 1994. Pet. App. 2a-4a. By Order filed September 13, 1994, the New Jersey Supreme Court denied the PMUA's petition for certification without written opinion, and dismissed a companion appeal taken by petitioner on alleged constitutional grounds.[1] Pet. App. 1a. That Order has not yet been reported.

JURISDICTION

Respondents agree that petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a) (1988). Respondents disagree that such jurisdiction has been properly invoked. Respondents will seek to establish herein that: (1) there is an adequate and independent

[1] N.J. Ct. R. 2:12-9 instructs that "[t]he denial of certification shall be deemed to be a summary dismissal of the appeal, and the Clerk of the Supreme Court [of New Jersey] shall forthwith enter an order dismissing the appeal, unless the Supreme Court otherwise orders."

state ground for all of the issues assigned as error by petitioner, and (2) petitioner did not raise the alleged unconstitutionality of the New Jersey Water Supply Management Act ("WSMA"), N.J. STAT. ANN. § 58:1A-1 to -17 (West 1992 & West Supp. 1994), in a timely and proper manner with the courts below.

COUNTER-STATEMENT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. V is accurately quoted at Pet. App. 22a but is not directly controlling because neither respondent is an instrumentality of the federal government.[2] The portions of the WSMA reproduced at Pet. App. 23a-30a are not all current.[3]

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[2] However, the NJDWSC (but not HWC) is a public authority of the State of New Jersey, and respondents note that the Fifth Amendment's Takings Clause has been deemed applicable to the states through the Fourteenth Amendment, U.S. CONST. amend. XIV. *See, e.g., Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897). *See also* note 14 *infra*.

[3] Sections 3, 6 and 8 of the WSMA, among others, were comprehensively amended in 1993, albeit not in a manner substantially affecting petitioner's constitutional claim. *See* 1993 N.J. Laws, c. 202, §§ 11 (*amending* N.J. STAT. ANN. § 58:1A-3), 1 (*amending* N.J. STAT. ANN. § 58:1A-6), and 4 (*amending* N.J. STAT. ANN. § 58:1A-8), *eff.* July 24, 1993.

COUNTER-STATEMENT OF THE CASE

The opinions of the Law Division of the New Jersey Superior Court granting respondents summary judgment and the Appellate Division affirming that judgment contain an accurate and essentially complete recitation of the facts germane to this petition. *See* Pet. App. 7a-11a; 2a-4a. The New Jersey courts properly held that there has been no taking of the PMUA's property because, as a matter of New Jersey substantive law, the petitioner does not have an underlying property right or interest capable of giving rise to such a claim.

On July 26, 1990, petitioner filed its Amended Complaint in which it claimed to hold the right to "the full use and benefit of the undiminished flow of the Passaic River at the Great Falls area located in Paterson, New Jersey." This water was alleged to be used by the PMUA to generate hydroelectric power. The PMUA claimed to be the successor-in-interest to the City of Paterson, which in turn was the alleged successor to the former Society for Establishing Useful Manufactures ("SUM"). The PMUA *inter alia* alleged a taking of its water, and sought monetary damages from HWC and the NJDWSC due to their diversion of water from the Passaic River and its tributaries upstream of the Great Falls for the provision of potable water to their customers. In so many words, the petitioner claimed an exclusive ownership interest in the entire natural flow of the Passaic River, without diminution, and wanted to be compensated by the respondents for their removal of water from the river before it reaches the petitioner's hydroelectric facility.

HWC is an investor-owned public water utility regulated by the New Jersey Board of Public Utilities ("NJBPU").[4] The NJDWSC is a statutory public authority created "[f]or the purpose of developing, acquiring and operating a water supply or a new or additional water supply for the use of the municipality and such other municipalities as may be authorized to join with it according to [its enabling legislation]." N.J. STAT. ANN. § 58:5-2 (West 1992).[5] Together, both the NJDWSC and HWC own and operate a water diversion and distribution system known as the Wanaque South Project,[6] a joint venture which supplies necessary potable water to hundreds of thousands if not millions of water customers throughout much of northern New Jersey.[7]

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[4] As a public utility, HWC is statutorily required to "furnish safe, adequate and proper service . . . and to maintain its property and equipment in such condition as to enable it to do so." N.J. STAT. ANN. § 48:2-23 (West 1969). The NJBPU is responsible for assuring that its rates are "just and reasonable." *See* N.J. STAT. ANN. §§ 48:2-21 (West 1969); 58:1A-9 (West Supp. 1994).

[5] The NJDWSC develops and operates water resources for specific municipal owners based on projections of need over reasonable periods of time. Although the NJDWSC is not subject to rate-setting oversight by the NJBPU, its enabling legislation contains other safeguards by which its rates are subject to scrutiny. *See* N.J. STAT. ANN. §§ 58:5-9 to -15 (West 1992).

[6] The joint venture was formerly known as the Two Bridges Project.

[7] Without offering any support, petitioner charges respondents with motivation for illicit profit. *See* Pet. Brf. 4, 6 & 9. Even if the presence of a profit motive had any relevance to an alleged unconstitutional taking, the facts obviously do not support the PMUA's accusation. *See also North Jersey Dist. Water Supply Comm'n v. Newark*, 103 N.J. Super. 542, 549, 248 A.2d 249, 252

Operating as the Wanaque South Project, respondents hold valid permits authorizing them to divert water from the Passaic River and other rivers miles upstream from the Great Falls in Paterson, which permits were issued in 1982 by the New Jersey Department of Environmental Protection ("NJDEP") pursuant to the WSMA. These permits are renewals of earlier regulatory approvals whose issuance followed a protracted administrative and court battle waged in the late 1970s and the early 1980s resulting in the reported case of *In Re North Jersey Dist. Water Supply Comm'n*, 175 N.J. Super. 167, 417 A.2d 1095 (N.J. App. Div. 1980), *certif. denied*, 85 N.J. 460, 427 A.2d 559 (1981) ("*In Re N. Jersey*"). In that case, the New Jersey Appellate Division upheld the September 25, 1978 written approval of respondents' application for water allocation by the former state Water Policy and Supply Council ("WPS Council") and the February 23, 1979 administrative Order issued by then-NJDEP Commissioner Daniel J. O'Hern upholding the action of the WPS Council and permitting the respondents, through their upstream water diversion, to encroach on a site included in the New Jersey Register of Historic Places, *i.e.*, the Great Falls of Paterson. *See* 175 N.J. Super. at 188-89, 196-205, 417 A.2d at 1106, 1110-15.

The PMUA's predecessor, the City of Paterson, objected to the WPS Council's approval and Commissioner O'Hern's Order, and it brought the appeal from those

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(N.J. Ch. Div.), *aff'd*, 52 N.J. 134, 244 A.2d 113 (1968) ("It is, of course, clear that the North Jersey District Water Supply Commission is not a private corporation seeking to make a profit").

actions considered in *In Re N. Jersey*. It argued unsuccessfully that the Wanaque South Project would impair the aesthetic appeal of the Great Falls and would result in its loss of potential hydroelectric generating capacity.[8] *Id.* at 187, 417 A.2d at 1105. Commissioner O'Hern's February 23, 1979 Order had concluded that any such impacts would only be minor and in all events did not outweigh the important public water supply needs that had engendered the Wanaque South Project proposal. *Id.* at 189, 417 A. 2d at 1106.

The Appellate Division in *In Re N. Jersey* held that the administrators had properly considered and evaluated all factors for and against the Project and it affirmed their determinations approving it. *See generally id.* at 196-205, 417 A.2d at 1110-15. The court also rejected as premature the City's application for an injunction because of infringement with its alleged water rights since "there [was] no showing, nor [could] there be, that the proposal as preplanned will violate any rights that Paterson has under the [SUM] deed." *Id.* at 183, 417 A.2d at 1103. Even assuming some validity to the City's claims, which the Appellate Division clearly did not, the court instructed that its only possible remedy would be an action for damages and not an injunction. *Id.* This obvious dictum

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[8] Prior to respondents' applications, the former SUM had operated a hydroelectric plant at the Great Falls region for a number of years. However, that facility had been out of service since 1969 and the City of Paterson was only in the process of planning the rehabilitation of the plant when *In Re N. Jersey* was decided. *See* 175 N.J. Super. at 187, 417 A.2d at 1105. The new hydroelectric facility did not actually become operational until several years later.

apparently became the impetus for the damages action that petitioner eventually brought against respondents in 1990.

Following *In Re N. Jersey*, respondents undertook the task of financing and later constructing the massive water diversion, storage and distribution project that their permits allowed. The PMUA also sought approvals for its proposed hydroelectric plant at the Great Falls. On March 11, 1981, some two years *after* Commissioner O'Hern's February 28, 1979 Order, the City of Paterson obtained a license from the Federal Energy Regulatory Commission ("FERC") authorizing rehabilitation of the abandoned SUM plant. That license contained the following language under Article 31:[9]

> This license shall not be construed as affecting in any way the validity of the diversion of water authorized by the order of the New Jersey Commissioner of Environmental Protection dated February 23, 1979, in the proceeding entitled In the Matter of the Application of the North Jersey District Water Supply Commission and the Hackensack Water Company, Amended

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[9] In view of this language, the PMUA's contention that its FERC license preempts all state water law and confers upon it special rights beyond that of a mere riparian owner, *see* Pet. Brf. 5, 10-11, is wrong. *See also First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n*, 328 U.S. 152, 175-76, *reh'g denied*, 328 U.S. 879 (1946) (section 27 of the Federal Power Act, 16 U.S.C. § 821 (1988), protects from supersedure state laws involving "proprietary rights" and water rights of the same nature as those relating to the use of water in irrigation or for municipal purposes, although direct intrusions upon federal regulation of hydroelectric power generation may still be preempted).

> Water Supply Application Nos. 1651 and 1685. The licensee's water rights acquired pursuant to State law, not this license shall govern any claim the licensee may advance for damages resulting from any future depletion in the flow of the water of the Passaic River and its tributaries.

On October 10, 1985, almost three years *after* respondents obtained their present WSMA permits, the PMUA also sought and obtained from the NJDEP a WSMA permit authorizing it to divert water at the Great Falls area for the generation of hydroelectric power.[10] The PMUA's permit contained the following language in paragraph 7:

> This permit shall not be construed as affecting in any way the validity of the diversion permits held by other permittees. This permit shall not govern any claim for damages resulting from any future depletion of the flow of the water of the Passaic River and its tributaries asserted by the applicant under claim of water rights acquired pursuant to State law.

Thus, both the petitioner's FERC license and its WSMA permit confirmed that, while it might not be precluded from *seeking* monetary damages because of respondents' previously permitted upstream water diversion, the validity of any such claim would be tested based on the existence or absence of the PMUA's alleged water rights as a matter of New Jersey law and not pursuant to

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[10] Under section 7(a) of the WSMA, petitioner had no choice but to obtain a water diversion permit. As amended by 1993 N.J. Laws, c. 202, § 1, that statute provides that "[n]o person may divert more than 100,000 gallons per day of any waters of the State . . . unless he obtains a diversion permit . . . [pursuant to the WSMA]." N.J. STAT. ANN. § 58:1A-7(a) (West Supp. 1994).

alleged grants contained in the license and permit themselves.

Respondents have never disputed that they divert water upstream of the Great Falls area and thus take water from the Passaic River that might otherwise reach the PMUA's facility via river flow. However, respondents have always maintained that petitioner does not have a cause of action for damages under any theory of relief because it does not have a property interest in the waters of the Passaic River *under New Jersey law* sufficient to sustain such a claim. After a careful evaluation of the various New Jersey statutes and cases cited by the parties below, both the trial court and Appellate Division agreed. They held that petitioner's damages claims must be dismissed because it has no ownership interest in the waters of the Passaic River beyond that of a mere riparian user and, under New Jersey law, this confers no special property rights. *See generally* Pet. App. 7a-11a; 2a-4a. The New Jersey Supreme Court, finding nothing erroneous about the lower courts' conclusions, declined to grant certification. *See* Pet. App. 1a.

It may help to put this matter into perspective to consider the sources that the petitioner identified for its alleged water rights, and why the New Jersey courts held that none of these sources supported the property interest that it claimed. Because the PMUA professed to be the former SUM's successor and argued that the SUM's water rights had originally derived from its legislative charter, *see* Pet. App. 8a, the state courts first examined that charter to determine if it contained a legislative delegation of water rights. They found that it did not.

The SUM was created in 1791 by an enabling act of the New Jersey Legislature: literally, the 18th Century equivalent of modern day articles of incorporation. *See* Act of November 22, 1791, Pat. 104, 1791 N.J. Laws 108 ("1791 Act"). Under its charter, the SUM was organized for the purpose of "carrying on the business of manufactures." *Id.*, § 1. Among other things, the 1791 Act empowered the SUM to purchase and hold property, to cut canals, and to collect tolls for the passage of vessels on any canals that it might build. *Id.*, §§ 1, 17 and 20. However, contrary to the PMUA's assertions, nowhere within the 1791 Act was there any so-called legislative grant to the SUM of exclusive rights to the "full use and benefit of the undiminished flow of the Passaic River." *See generally id.*, §§ 1 to 38. This determination was explicitly reached by the New Jersey trial court, which noted that a series of early 19th Century cases upon which petitioner had relied to interpret the Act stood only for the proposition that the SUM possessed the common law rights of a riparian owner. *See* Pet. App. 8a. The trial court's conclusion was later restated and affirmed by the Appellate Division in denying the PMUA's appeal. *See id.* at 3a.

The PMUA also argued that these same early 19th Century cases supported its position that the SUM's water rights included the exclusive right to the running water of the Passaic River without "diminution or alteration." *See* Pet. App. 8a. The cases that it cited included *Society for Establishing Useful Manufactures v. Low*, 17 N.J. Eq. 19 (N.J. Ch. 1864), *Society for Establishing Useful Manufactures v. Morris Canal & Banking Co.*, 1 N.J. Eq. 157 (N.J. Ch. 1830), and *Between the Society for Establishing Useful*

Manufactures and Morris Canal and Banking Co., 30 N.J. Eq. 145 n. (1829). However, as the lower courts held, all of these cases described nothing more than the old English "natural flow" theory of riparian doctrine that had apparently been the common law in New Jersey a century and a half ago. *See* Pet. App. 9a; *cf.* Pet. App. 3a.

Respondents showed and the trial court agreed that the English "natural flow" theory has not been the common law in New Jersey since at least 1956, and probably much earlier,[11] when New Jersey formally announced adherence to the more modern American or "reasonable use" doctrine in such cases as *Armstrong v. Francis Corp.*, 20 N.J. 320, 120 A.2d 4 (1956), and *Borough of Westville v. Whitney Home Builders, Inc.*, 40 N.J. Super. 62, 122 A.2d 233 (N.J. App. Div. 1956). *See* Pet. App. 9a-10a.[12] The trial court also noted that when the New Jersey Legislature

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[11] Petitioner's continued citation to early 19th Century riparian cases, *see* Pet. Brf. 9 n. 4, 10 & n. 6, fails to acknowledge this point entirely.

[12] Under the old English rule, riparian owners were entitled to water absolutely undiminished in quantity and quality. *See* Lechner, *Riparian Rights to Water Quality*, 6 SETON HALL LEGIS. J. 339, 340 (1983). However, it has been recognized that application of this doctrine "severely limits the consumptive uses that may be made of the water since virtually any consumptive use will diminish the quantity or quality of the water available to other users downstream." 5A POWELL ON REAL PROPERTY, ¶ 713[4][a], at 65-75 (1991). As a result, the "natural flow" doctrine has been abandoned by most riparian jurisdictions. *Id.*, at 65-77. By contrast, the majority of riparian states now follow the less restrictive American view (or "reasonable use" theory), which permits each riparian proprietor to use "water for any lawful purpose so long as the use is reasonable and does not unreasonably interfere with the legitimate uses and needs of other proprietors on the stream." *Id.*, ¶ 713[4][b], at 65-77.

adopted the Water Supply Management Act in 1981, it specifically found that the "water resources of the state are public assets of the state held in trust for its citizens," "that ownership of these assets is in the state," and that adoption of the WSMA was necessary to insure adequate water supplies. Pet App. 10a, *quoting from* N.J. STAT. ANN. § 58:1A-2 (West 1992).[13] Therefore, petitioner's claim to exclusive ownership of the Passaic River waters was clearly not recognized by any pertinent, present-day New Jersey authority.

In affirming the trial court's grant of summary judgment, the Appellate Division placed strong reliance on its earlier decision in *Johns-Manville Sales Corp. v. New Jersey Water Supply Auth.*, 211 N.J. Super. 315, 511 A.2d 1194 (N.J. App. Div. 1986). *See* Pet. App. 3a. In that case, the court upheld the validity of a regulation that imposed water diversion charges on a riparian property owner who had been diverting water from an adjacent river for decades prior to the enactment of the regulation. The court rejected the riparian owner's takings claim, holding that:

> Manville's principal contention is that none of those statutes allows the Authority to charge a riparian owner for the exercise of its common law right to divert water from its natural flow. We find no merit in that contention. *Manville does not own the water flowing by its property. That water is publicly owned.* . . .

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[13] Absent a valid legislative grant, which the 1791 Act was not, New Jersey's claim to public ownership of the State's running waters is an ancient and well-recognized doctrine. *See, e.g., Cobb v. Davenport*, 32 N.J.L. 369, 378 (N.J. Sup.Ct. 1867); *Arnold v. Mundy*, 6 N.J.L. 1, 71-78 (N.J. Sup.Ct. 1821).

* * *

> The riparian owner is limited to a "reasonable use" of the waters of a stream or water course abutting his property; what constitutes reasonable use is "a question of fact to be determined in each case upon a consideration of all the relevant circumstances." *Armstrong v. Francis Corp.*, 20 *N.J.* 320, 330[, 120 A.2d 4](1956). *Thus the fact that Manville drew a certain volume of water from the river at one point in time does not confer on it any "right" to continue to do so.*
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> * * *
>
> For substantially the same reasons, we also find without merit Manville's alternative contention that the effect of [the regulation] is to take its private property without just compensation. *The water resources are publicly owned and subject to State regulation; the State's action in allocating those resources does not invade any constitutionally protected interests* of Manville. *Cf. Reingold v. Harper*, 6 *N.J.* 182, 193-95[, 78 A.2d 54] (1951).

Id. at 318, 320-21, 511 A.2d at 1195-1196, 1197 (emphasis added; citations omitted).

Petitioner appears to read more into the rights of a riparian owner than exists under New Jersey law. That State's common law has never held that a riparian holder has an absolute ownership interest in water flowing on its land. Instead, the common law recognized that:

> in view of the transient and flowing nature of water, the landowner's property therein is not absolute, but qualified. In a sense he owns it while it is upon his land, but *his ownership is limited to a usufructuary interest.* . . .

McCarter v. Hudson County Water Co., 70 N.J. Eq. 695, 708, 65 A. 489, 494 (E. & A. 1906), *aff'd*, 209 U.S. 349 (1908) (emphasis added). A usufruct is:

> defined as "the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility and advantage which it may produce, provided it be without altering the substance of the thing." . . . Importantly, however, it is in the nature of a right to make use of water only; and the right itself does not represent an ownership interest in the actual corpus of water until the water is reduced to possession.

5A POWELL ON REAL PROPERTY, *supra*, ¶ 710[3][a], at 65-36 (citations omitted).

Consequently, the New Jersey courts properly held that under that State's substantive law the PMUA has no property interest in the waters of the Passaic River entitling it to maintain a takings claim against respondents.

REASONS FOR DENYING THE WRIT – SUMMARY OF ARGUMENT

Petitioner advances two reasons for granting the writ: (1) this case presents an important issue of federal constitutional law which has not been, but should be, settled; and (2) the state courts decided this action in a manner that conflicts with applicable decisions of this Court. Pet. Brf. 6. However, in its zeal to fabricate a basis for review, petitioner ignores the most fundamental aspect of the state court opinions that it asserts were in error: That is, none of those decisions turned in any way

on (or even discussed) petitioner's federal constitutional claims, nor did they address at all the several opinions of this Court that petitioner now maintains are in conflict with the opinions below.

Of course, petitioner would have this Court believe that the New Jersey courts' failure to consider these issues constitutes egregious error. However, the real reason these issues were not addressed is much simpler: The state courts recognized that this litigation could be fully resolved within the scope of New Jersey substantive property law. The New Jersey courts must have realized that any federal constitutional claims raised by the PMUA were not integral to their analysis at all, and it was not necessary to look beyond the substantive law of New Jersey to address the various opinions of this Court that petitioner cited.

Accordingly, respondents respectfully submit that the reasons for denying the writ are really two, both of which stem from the essential jurisdictional requirement of 28 U.S.C. § 1257(a) that a substantial federal question must have been properly raised and considered in the state court proceedings: (1) the lower courts' opinions rest on independent and adequate state law grounds, *i.e.*, that the PMUA does not have a property interest in the waters of the Passaic River capable of being taken; and (2) petitioner failed to raise a direct challenge to the constitutionality of the WSMA until it sought review before the New Jersey Supreme Court, thus precluding meaningful and timely review of this claim.[14] As it happens, there is

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[14] A third reason to deny certiorari may exist solely with respect to HWC. Although a New Jersey public utility, HWC is a

no issue of constitutional dimension presented by the determinations below at all, nor is there any conflict between the New Jersey opinions and other decisions of this Court. Therefore, the writ of certiorari should be denied because no "special and important reasons" have been presented for its issuance. SUP. CT. R. 10.1.

A. THE JUDGMENT BELOW RESTS ON ADEQUATE AND INDEPENDENT STATE LAW GROUNDS: THE NEW JERSEY COURTS PROPERLY HELD AS A MATTER OF STATE LAW THAT THE PETITIONER DOES NOT POSSESS ANY PROPERTY INTEREST IN THE WATERS OF THE PASSAIC RIVER CAPABLE OF BEING TAKEN

It is well-established that this Court lacks jurisdiction to review a state court judgment where there exists "independent and adequate" state grounds to support the judgment. *Black v. Cutter Labs*, 351 U.S. 292, 298 (1956); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935). The basis for this limitation is "the partitioning of power between the state and federal judicial systems and in the limitations of [this Court's] own jurisdiction. [This Court's] only power over state judgments is to correct them to the

---

private corporation and, other than via state regulation and through its joint venture relationship with the NJDWSC, has no affiliation with the State of New Jersey. Therefore, a substantial issue exists of whether, and if so how, HWC's actions can translate as a "public use" under the Fifth Amendment's Takings Clause or may otherwise meet the requirements of "state action" necessary to invoke the Fourteenth Amendment. *Cf. Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

extent that they incorrectly adjudge federal rights." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945).

As this Court has recognized, "the first step [in takings analysis] is to identify a property . . . interest entitled" to constitutional protection. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 260 (1987). *Accord, Vitek v. Jones*, 445 U.S. 480, 487 (1980). However,

> [p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source *such as state law* – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) (emphasis added). Accordingly, in *United States v. Rodgers*, 461 U.S. 677, 683 (1983), this Court recognized that the "definition of underlying property interests is left to state law," while the "consequences that attach to those interests [that in fact exist] is a matter left to federal law."

In this matter, there is no question that the New Jersey state courts fully considered all of petitioner's arguments and properly found that they lacked merit *as a matter of New Jersey state law*. After finding that the trial court had correctly determined that neither the 1791 Act "nor any succeeding statutory or decisional law" supported the PMUA's claim, and that it "does not have greater rights than any other riparian owner to the waters of the Passaic River," the Appellate Division held:

> *These holdings are dispositive of the appeal.* PMUA stated its cause of action as one for a

> taking of its property without compensation. PMUA did not, and does not, contend that the State's allocation of water is unreasonable. . . .

Pet. App. 3a-4a (emphasis added). Plainly, no issue of federal dimension was even necessary to be addressed because the analysis turned exclusively upon New Jersey's substantive law.

The appropriateness of denying certiorari in these circumstances is confirmed by this Court's recent decision to deny certiorari in *Stevens v. City of Cannon Beach*, ___ U.S. ___, 114 S. Ct. 1332 (1994) ("*Stevens*"). The petitioners in *Stevens* were owners of vacant lots in a dry sand area of the City of Cannon Beach, Oregon. They brought an inverse condemnation action, alleging that the denial of permit applications to construct sea walls on their land constituted an unconstitutional taking. The Oregon state courts denied the petitioners' claim on the ground that their property interests did not include the right to interfere with the public's right to use the dry sand area as recognized by the Oregon Supreme Court in the decision of *State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P.2d 671 (1969) ("*Thornton*"). *See Stevens v. City of Cannon Beach*, 114 Or. App. 457, 835 P.2d 940, 941 (1992), *aff'd*, 317 Or. 131, 854 P.2d 449 (1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1332 (1994). This Court denied petitioners' petition for certiorari over the dissent of Justices Scalia and O'Connor. 114 S. Ct. at 1332. The instant case raises even stronger independent and adequate state grounds for denying a writ than did *Stevens*.[15]

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[15] In Stevens, the dissenters raised concerns about the denial because, in their view, the Oregon Court of Appeals had

All of the prior decisions of this Court relied upon by the PMUA are inapposite because the takings analysis in those cases presupposed the existence of a property interest subject to constitutional protection. In each of those decisions, the sole issue before this Court was whether the government's alleged interference with the claimant's *existing* property right was of sufficient dimension and scope to constitute a taking. The threshold issue of whether the claimant held a property interest was simply not at issue, being either self-evident or not raised before this Court.

Hence, in *Dolan v. City of Tigard*, ___ U.S. ___, 114 S. Ct. 2309 (1994), this Court was called upon to address the issue of whether a city's requirement that a landowner dedicate a portion of her property within a flood plain for the improvement of a storm drainage system and adjacent property for a bicycle/pedestrian pathway as a condition for a building permit approval amounted to a regulatory taking. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court considered whether a New York law requiring a property owner to permit the permanent installation of cable facilities on its property constituted a physical taking. In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), this Court considered

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misinterpreted the *Thornton* opinion and thus relied upon "non-existent rules of state substantive law." *Id.* at 1334. The present petition does not raise any similar concerns. As previously noted, all of the New Jersey state court holdings were well-founded and consistent with established state law. Significantly, petitioner has failed to cite to a single, modern New Jersey authority to show that the state courts' resolution of their own property law was erroneous.

whether a governmental regulation requiring public access to a private marina amounted to a taking. In the course of finding that the regulation was a taking, the Court acknowledged that "what petitioners now have is a body of water that was private property under Hawaiian law." *Id.* at 179. In *Dugan v. Rank*, 372 U.S. 609 (1963), this Court did not address whether a property interest existed but, instead, apparently assumed the plaintiff's right "to the full natural flow" of the river at issue which the riparian owner held under the archaic "natural flow" theory followed by California common law at the time. *See id.* at 615-16, 620, 623-24. And in *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950), this Court addressed the issue of whether the government's actions in constructing a dam which continuously maintained the level of the Mississippi River soaking the plaintiff's land and destroying its agricultural value constituted a taking.

In *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S. Ct. 2886 (1992), this Court addressed the issue of whether a state law prohibiting a beachfront owner from constructing single family homes on its property constituted a taking. The Court did address the threshold issue of whether a property interest existed – which had not been considered by the courts below – and stated that:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation *only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.*

112 S. Ct. at 2899 (emphasis added). The Court further stated that whether such a limitation existed was an issue of "state law to be dealt with on remand." *Id.* at 2901.[16]

In sum, petitioner's complaint was dismissed by the New Jersey courts because it does not have a property interest under state law entitling it to anything more than the right to the "reasonable use" of the waters of the Passaic River as a riparian user. It does not own the water in the river – the State of New Jersey does – and respondents have been authorized by the State to divert the water that they take via permits duly issued under the WSMA. There being clearly adequate and independent state law grounds for dismissal of the PMUA's takings claim, there is no jurisdictional basis for this Court to grant a writ of certiorari and the request should be denied.

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[16] Petitioner also relies upon *North Carolina v. Hudson*, 665 F. Supp. 428 (E.D.N.C. 1987). That decision is likewise inapposite. In *Hudson*, the issue before the court involved a challenge to the United States Army Corp of Engineers' authority to issue permits to a municipality to construct a water intake structure. Although the court commented upon the status of North Carolina riparian law, it rejected the plaintiffs' assertion of a takings claim on the ground that the issuance of the permits would not give rise to a compensable claim. In this regard, the court expressly held that "[i]ssuance of the permit confers no property rights" and that "[r]iparian doctrine is simply not relevant to the permit application consideration." *Id.* at 447-48.

B. THE PETITIONER'S FAILURE TO DIRECTLY CHALLENGE THE CONSTITUTIONALITY OF THE NEW JERSEY WATER SUPPLY MANAGEMENT ACT UNTIL IT FILED ITS PETITION FOR CERTIFICATION BEFORE THE NEW JERSEY SUPREME COURT RENDERS THIS CLAIM INAPPROPRIATE FOR CERTIORARI REVIEW

Petitioner also requests this Court's review to assess the constitutionality of the WSMA. It asserts:

> [I]f the WSMA declares state ownership of property previously purchased by others and permits the taking of property without compensation as presently held in this matter, the statute is unconstitutional as applied.

Pet. Brf. 10. Although this assertion provides no ground for review not already subsumed by the lower courts' adequate and independent state law analysis, an alternative basis exists for denying the PMUA's request to review the WSMA's constitutionality specifically: The petitioner never sought to directly challenge the constitutionality of the WSMA until it filed its petition for certification with the New Jersey Supreme Court. Having failed to raise this issue in a proper or timely fashion for consideration by the inferior New Jersey courts, petitioner should not be permitted to argue this issue, on the merits, for essentially the first time before this Court.

The PMUA did, of course, argue before the trial court and the Appellate Division that the respondents' diversion of waters from the Passaic River constitutes an unconstitutional taking. *See, e.g.*, Pet. App. 19a-21a;

15a-18a. Petitioner also asserted before these courts variously that: (1) the WSMA should be read in a manner so as not to preclude its takings claim against the respondents; (2) the WSMA and the 1791 Act should be read *in pari materia*; (3) petitioner's FERC license and other alleged existing rights preempt state control under the WSMA; and (4) the State of New Jersey never took petitioner's alleged water rights by virtue of adoption of the WSMA. *See generally id.* However, petitioner never asserted a *direct* challenge to the constitutionality of the WSMA until it sought a grant of certification by the New Jersey Supreme Court. *See* Pet. App. 12a-14a.[17]

In fact, the PMUA affirmatively represented to both the trial court and the Appellate Division that it was *not* challenging the legality, much less the constitutionality, of the WSMA but, rather, was merely seeking compensation *from the respondents* because of *their* diversion of water from the Passaic River. In opposition to respondents' motion for summary judgment in the trial court, the PMUA stated that it did "not take issue with the [State's] granting of the water diversion permits" to respondents and that "neither the adoption of the WSMA nor the State's issuance of the permits to the defendants has caused this plaintiff to suffer damages." Res. App. 2a. In oral argument before the trial court, petitioner's attorney asserted:

> The state of New Jersey passed a regulation. We accept it. It's been ruled upon. They [the State]

---

[17] The PMUA's footnote 3 is not to the contrary. *See* Pet. Brf. 5-6, n. 3.

> have the right under the Management Act to say, "They can take that water."

Res. App. 4a-5a.

In the Appellate Division, the PMUA represented to the court that:

> The defendants misunderstand (or choose to misstate) plaintiff's position. . . . Plaintiff *does not* take issue here with the validity or scope of the water diversion permits issued to defendants. . . . Stated otherwise, plaintiff takes no issue with the ability of the WSMA to grant permits to others to divert a certain quantity of water at the Great Falls. . . .

Res. App. 8a (emphasis original). Based upon these representations, the Appellate Division noted that the "PMUA stated its cause of action as one for a taking of its property without just compensation" and that the "PMUA did not, and does not, contend that the State's allocation of water [pursuant to the WSMA] is unreasonable." Pet. App. 3a-4a.[18]

This Court has held it to be a jurisdictional prerequisite that constitutional claims be asserted below, and that review of claims not raised below will not be granted. *See Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). *See also District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483 n. 16 (1983) ("[b]y failing to raise his claims in state court a plaintiff may forfeit his right to obtain review of the state court decision in any federal court").

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[18] Giving petitioner the benefit of the doubt, its position before the trial court and the Appellate Division was at the very least confusing, if not inconsistent.

Furthermore, merely raising a constitutional claim abstractly before a state court is not sufficient to preserve it. It must be raised, presented and pursued in a proper and timely manner at the appropriate point in the state court proceedings. *Beck v. Washington*, 369 U.S. 541, 550-54 (1962); *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919).

Here, where petitioner's belated direct challenge to the WSMA's constitutionality only *first* occurred before the state Supreme Court – which obviously did not pass upon the merits because it declined to grant petitioner's application for certification – petitioner has not met this standard. When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969).

Under these circumstances, the Court should deny the PMUA's certiorari request challenging the constitutionality of the WSMA as untimely and having been improperly presented to the state courts for resolution.

CONCLUSION

For the reasons set forth above, the PMUA's petition for a writ of certiorari directed to the New Jersey Supreme Court should be denied. Petitioner has failed to present any special or important reasons for this Court's review.

MARTY M. JUDGE
DRINKER, BIDDLE & REATH
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(609) 921-6336

Attorneys for Respondents

Dated: January 11, 1995

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: PASSAIC COUNTY
Docket No. PAS-L-6702-90
Civil Action

PATERSON MUNICIPAL UTILITIES AUTHORITY,
a Public Body,

Plaintiff,

-vs.-

HACKENSACK WATER COMPANY, a Corporation,
and NORTH JERSEY DISTRICT WATER SUPPLY
COMMISSION, a Public Body,

Defendants.

PLAINTIFF PATERSON MUNICIPAL UTILITIES AUTHORITY'S BRIEF IN OPPOSITION TO SUMMARY JUDGMENT MOTION

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* * *

It cannot be presumed that enactment of the WSMA repealed the legislation which established the S.U.M. and

granted various rights to it. This is certain where both acts can be read in *pari materia.*

The purpose of the WSMA was to enable the State to " . . . manage the water supply by adopting a uniform water diversion permit system . . . " *N.J.S.A.* 58:1A-2. The plaintiff here does not take issue with the granting of the water diversion permit to these defendants. That was litigated in the agencies and confirmed by the Appellate Division in *In Re North Jersey Dist. Water Supply Comm'n,* 175 N.J. Super. 167 (App. Div. 1980), *cert. den.,* 85 N.J. 460 (1981). What it does object to, however, is that the use does deprive the plaintiff of its rights, and it should therefore be compensated for the rights which it has lost. Contrary to the movant's assertion, the PMUA does not claim it is entitled to "receive a fixed quantity of water flow in the Passaic River in perpetuity, to the exclusion of all other water users . . . " What it does claim is that if other users divert, that they must compensate the plaintiff for the damages the diversion has caused or will cause.

* * *

POINT IV

THE DAMAGE SUFFERED BY THE PLAINTIFF WAS CAUSED BY THE DEFENDANTS AND NOT THE STATE

As has been demonstrated throughout this Brief, neither the adoption of the WSMA nor the State's issuance of the permits to the defendants has caused this plaintiff to suffer damages. The movants have conjured up a straw man argument that it is the State who is responsible for

the damages suffered by the PMUA. This position is wholly without merit. Neither the WSMA nor the permits issued to the defendants deny the plaintiff its right to recover damages as a result of the diversion by the defendants.

It is neither the State nor the DEPE, pursuant to the WSMA, which receives a benefit as a result of the defendants' diversion. The defendants, not the State of New Jersey, sell and profit by their use of the water being diverted. Their profit and resultant unjust enrichment, is at the expense of the plaintiff.

* * *

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-CIVIL PART
PASSAIC COUNTY
DOCKET NO. PAS-L-6702-90

PATERSON MUNICIPAL UTILITIES AUTHORITY

Plaintiff,

-v-

HACKENSACK WATER COMPANY and NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION

Defendants.

TRANSCRIPT OF ORAL ARGUMENT ON MOTION FOR SUMMARY JUDGMENT

PLACE: Passaic County Superior Court
77 Hamilton Street
Paterson, New Jersey
DATE: July 2, 1992

BEFORE:

THE HONORABLE HERBERT S. ALTERMAN, J.S.C.

TRANSCRIPT ORDERED BY:

JOANNE L. GRAF, ESQUIRE

(Stern, Steiger, Croland, Tanenbaum and Schielke)

APPEARANCES BY:

BRUCE ACKERMAN, ESQUIRE
(Stern, Steiger, Croland, Tanenbaum and Schielke)
On Behalf of the Plaintiff.

MARTY M. JUDGE, ESQUIRE
(Stryker, Tams and Dill)
On Behalf of the Defendant.

Proceedings recorded by electronic sound recording, transcript produced by transcript service.

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* * *

[MR. ACKERMAN:] The U.S. Supreme Court said to the contrary. First of all, it is a taking. De minimis or insubstantial is not the issue. A taking is a taking, it has to be fairly compensated for. And in the *Lorretto* opinion it referred to *Kaiser Aetna versus United States* and stated, "The holding of that court as the government's imposition of a navigational servitude, which was an easement across waters, requiring public access to a pond was a taking where the land owner had reasonably relied on the government's consent in connecting the pond to navigable water."

It went on to hold that even if the government physically invades only an easement in property it must nonetheless pay compensation.

Now, Mr. Judge has tried to say we should be suing the state of New Jersey. But the state of New Jersey didn't get any benefit from something we've lost. The state of New Jersey passed a regulation. We accept it. It's been

ruled upon. They have the right under the Management Act to say, "They can take that water."

But that's not to say that just because they got an authorization to take it, that we have to sue the state. The state didn't take it from us. The state doesn't get the benefit from it. If the state did take it, and said, "We're taking the water and we're using it," we would be suing the state. And I think under the U.S. Supreme Court line of cases . . . .

* * *

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-487-92T1
Civil Action

PATERSON MUNICIPAL UTILITIES AUTHORITY,
a Public Body,

Plaintiff,

-vs.-

HACKENSACK WATER COMPANY, a Corporation, and
NORTH JERSEY DISTRICT WATER SUPPLY
COMMISSION, a Public Body,

Defendants.

On Appeal From the Order Granting Summary
Judgment of the Superior Court of
New Jersey, Law Division
Passaic County

SAT BELOW:

Honorable Herbert S. Alterman

REPLY BRIEF AND APPENDIX ON BEHALF OF PLAINTIFF/APPELLANT PATERSON MUNICIPAL UTILITIES AUTHORITY

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* * *

The defendants misunderstand (or choose to misstate) plaintiff's position. Plaintiff *does not* maintain (as the defendants erroneously state in their brief) that it has the absolute right to divert a certain quantity of water *ad infinitum*, because its predecessors have done so. Db39. Plaintiff *does not* take issue here with the validity or scope of the water diversion permits issued to defendants. The latter was the main issue litigated in *In Re North Jersey Dist. Water Supply Comm'n*, 175 N.J. Super. 167 (App. Div. 1980), *cert. den.*, 85 N.J. 460 (1981).

However, plaintiff does object to the defendants' diversion under permit depriving plaintiff of its lawful rights as a property owner and causing plaintiff to suffer tremendous damage without compensation. Stated otherwise, plaintiff takes no issue with the ability of WSMA to grant permits to others to divert a certain quantity of water at the Great Falls. . . .

* * *